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Nos. A-370 & 90-767

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

CABLE NEWS NETWORK, INC., *et al.*,

Petitioners,

—v.—

MANUEL ANTONIO NORIEGA and
UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF *CERTIORARI* TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF PETITIONERS' APPLICATION FOR A STAY AND PETITION FOR *CERTIORARI*

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INTEREST OF AMICUS[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with over 275,000 members dedicated to preserving the principles embodied in the Bill of Rights. In pursuit of that goal, the ACLU has participated in virtually every major free speech controversy decided by this Court during the past half-century, including such prior restraint cases as *Nebraska Press Ass'n v. Stuart*, 427 U.S 539 (1976), and *New York Times Co. v. United States*, 403 U.S. 713 (1971). This case involves yet another prior restraint. The issues it raises are therefore directly related to the central organizational concerns of the ACLU.

INTRODUCTORY STATEMENT

Amicus curiae respectfully prays that the Court act forthwith to remove existing legal obstacles to the publication or broadcast of conversations between Gen. Manuel Noriega and members of his defense team contained on tape recordings in the possession of Cable News Network (CNN). *Amicus* understands that the recordings were made by agents of the United States government, arguably in violation of General Noriega's Sixth Amendment right to counsel. General Noriega has succeeded in persuading the lower courts to enter prior restraints against the publication or broadcast of the tapes by CNN.

Where, as here, a speaker has been enjoined from broadcasting material that arguably implicates the government in wrongdoing, and where the interests asserted

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[1] Letters of consent from petitioners and respondent United States are being lodged with the Clerk of the Court along with this brief. Due to the expedited briefing schedule, counsel for respondent Noriega has provided his oral consent and represented to counsel for *amicus* that he would expeditiously file an appropriate consent letter.

in support of the prior restraint manifestly fail to satisfy the extremely stringent standards governing the issuance of a prior restraint, this Court should act immediately to remove the ban.

In its present posture, this case involves only the issue of a prior restraint. It does not involve the question of whether CNN in fact violated the district court's order and, if so, what consequences should follow from that disobedience. The question of CNN's possible contempt has not been resolved in the lower courts and is not before this Court. Likewise, the facts of this case make it unnecessary to decide whether the press can *ever* be required to turn over materials in its possession in order to facilitate a judicial balancing of interests. Before any such burden can even be contemplated, the moving party must articulate some specific grounds for believing that the stringent standards for a prior restraint can be met. Here, General Noriega has offered nothing more than plainly inadequate conclusory assertions. Moreover, even a worst-case scenario would not justify a prior restraint under this Court's decision in *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539.

ARGUMENT

THE PRIOR RESTRAINT ISSUED BY THE TRIAL COURT VIOLATES THE FIRST AMENDMENT

A. The Constitutional Ban on Prior Restraints

Since this Court's decision in *Near v. Minnesota*, 283 U.S. 697 (1931), prior restraints have been recognized as uniquely dangerous to our system of free expression. Unlike subsequent sanctions, prior restraints absolutely prevent the introduction of information into the marketplace of ideas, thereby impoverishing public discourse, preventing public discussion and promoting public ignorance. Indeed, the potential for widespread public igno-

rance made possible by a prior restraint acts as a constant temptation to government officials and public figures to use the device to cover up embarrassing or incriminating information. *Cf. Nebraska Press Ass'n v. Stuart*, 427 U.S. at 608 (Brennan, J., concurring).

Furthermore, the corrosive suspicion engendered by any resort to prior restraint inevitably introduces destabilizing rumors and widespread mistrust of government. It is no coincidence that the extraordinary stability of American institutions is linked to a system of free expression that permits citizens to have confidence that relevant information is not being kept from them on one pretext or another. It is the virtually total ban on prior restraints that has made possible such priceless confidence.

Recognizing the unique threat to a system of free expression posed by prior restraints, this Court has repeatedly refused to tolerate their existence. *See, e.g., Nebraska Press Ass'n v. Stuart*, 427 U.S. 539; *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975); *New York Times Co. v. United States*, 403 U.S. 713; *Organization for a Better Austin v. Keefe*, 402 U.S. 715 (1971); *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175 (1968); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963). Whether the context has involved military secrets, aesthetics, journalistic judgment, or politics, this Court has never sustained a prior restraint.

Given the extreme disfavor with which prior restraints have been viewed in this Court, *amicus* has urged that the Court announce a categorical ban on their use. Instead, the Court has maintained a narrow window of theoretical possibility, while erecting burdens of justification that have made it all but impossible to obtain a prior restraint. Thus, while it remains theoretically possible to obtain a prior restraint in narrowly circumscribed settings, an applicant must persuade a court (1) that an evil of transcendent importance will

inevitably flow from the speech in question; and (2) that no other way of averting the evil exists. On the facts of this case, it is impossible for General Noriega to carry his extremely demanding burden. Indeed, if the facts of this case are deemed sufficiently compelling to warrant a prior restraint, 60 years of carefully crafted jurisprudence of this Court will be eroded and our system of free expression severely wounded.

B. The Interests Asserted in Favor of the Prior Restraint

1. The Attorney-Client Privilege

General Noriega argues that a prior restraint is necessary to protect the confidentiality of the attorney-client relationship. While *amicus* agrees that the Sixth Amendment right to counsel carries with it a guaranty of confidential communication between lawyer and client, that confidentiality has been irrevocably shattered by the government's arguably improper taping of the conversations in question. The bedrock purpose of the attorney-client privilege is not to protect the reputational interests of clients, but to prevent an adversary from gaining an advantage by eavesdropping on communications between a lawyer and client. When the government deliberately taped General Noriega's conversations with his defense team, the government irrevocably breached the attorney-client privilege with respect to the information contained in those conversations. *Cf. Weatherford v. Bursey*, 429 U.S. 545 (1977). Not even a prior restraint can repair that injury. Thus, from the standpoint of the attorney-client privilege, the prior restraint does not repair the injury caused by government misconduct; it merely prevents the general public from learning of the extent and nature of the improper taping.

2. The Right to an Unbiased Jury

General Noriega also complains that the broadcast of his conversations with his defense team might jeopardize his right to an unbiased jury because prospective jurors may be tainted by exposure to prejudicial material. Once again, *amicus* agrees that the Sixth Amendment guarantees General Noriega a trial before a jury that is not tainted by exposure to prejudicial publicity. However, the issuance of a prior restraint is neither necessary nor appropriate to assuring that end.

Indeed, the trial court did not find that the *Nebraska Press* standards had been met. Instead, the trial court found, and the court of appeals agreed, that the *Nebraska Press* standards could not be applied unless CNN first turned over the tapes to the trial court for its evaluation. The trial court thereby provoked a confrontation with CNN, and the First Amendment, that could easily have been avoided.

The question of whether the press can ever be required to produce material in its possession for the court's inspection is a matter of substantial controversy. *See, e.g., Goldblum v. National Broadcasting Co.*, 584 F.2d 904 (9th Cir. 1978)(Kennedy, J.). But there is a general consensus that such a production order, if ever valid, must at least be based on a particularized showing of harm by the party seeking a prior restraint. As Justice Brennan wrote in the Pentagon Papers case:

> In no event may mere conclusions be sufficient; for if the Executive Branch seeks judicial aid in preventing publication, it must inevitably submit the basis upon which that aid is sought to scrutiny by the judiciary. And therefore, every restraint issued in this case, whatever its form, has violated the First Amendment -- and not less so because the restraint

> was justified as necessary to afford the courts an opportunity to examine the claim more thoroughly. Unless and until the Government has clearly made out its case, the First Amendment commands that no injunction may issue.

New York Times Co. v. United States, 403 U.S. at 727.

In this case, General Noriega not only failed to make a particularized showing of harm, he explicitly refused to do so. Thus, when the issue of reviewing the tapes first arose, General Noriega's counsel advised the trial court,

> if you are going to listen to the tape, you need to put it in context. Therefore, you are going to have to have me tell you my entire defense strategy. You are going to have to have me tell you how that tape fits within the broad category of defending General Noriega. Your are going to have to have me tell you the relevance. And that, most respectfully, I refuse to do.

App. 81a. However understandable that concern may be, it could have been solved by temporarily excluding the prosecutor from the courtroom and does not justify evading the rigorous requirements for a prior restraint that this Court has painstakingly erected over 60 years.

Moreover, even if one were to assume a worst-case scenario concerning the contents of the tapes, a prior restraint would not be justified. As in *Nebraska Press*, where the disclosure of an inadmissible confession was not deemed sufficiently threatening to warrant a prior restraint, the obvious remedy in this case is careful *voir dire* of prospective jurors to assure that they have not been tainted by any improper publicity. Such a remedy is all the more obvious since the notoriety of the circum-

stances surrounding General Noriega's seizure by armed invasion, the widespread publicity surrounding the government's seizure of his assets, and the public concern elicited by the government's taping of conversations with his lawyers render it a certainty that painstaking *voir dire* of the jury venire will be necessary. However, as with the recent trials of Marion Barry and Oliver North, experience has shown that a fair jury can be assembled despite the existence of a notorious defendant. Nothing in this record can justify the trial court's apparent assumption that only the drastic expedient of a prior restraint will make possible the empanelling of an unbiased jury.

The trial court's ruling substitutes a rule of convenience for a requirement of necessity in order to obtain a prior restraint and in so doing strikes a serious blow to our system of free expression.

CONCLUSION

For the reasons stated herein, petitioners' application for a stay should be granted and a writ of *certiorari* should issue to review and reverse the prior restraint entered in this case.

Respectfully submitted,

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